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Diane P. Wood

Diane.Wood@chicagounbound.edu

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# Court-Annexed Arbitration: The Wrong Cure

Diane P. Wood†

Civil litigation is in a state of crisis in the federal courts of the United States.<sup>1</sup> In district after district, the sheer volume of criminal cases pending on the docket, coupled with a relentlessly increasing civil caseload, means that a civil litigant can expect lengthy delays, often exceeding three years, before obtaining his or her "day in court" at trial.<sup>2</sup> The situation in many state courts ap-

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† Harold J. and Marion F. Green Professor of International Legal Studies and Associate Dean, The University of Chicago. I gratefully acknowledge the support of the Bernard G. Sang Faculty Fund for this work. I also thank Dennis J. Hutchinson and Larry Kramer for comments on earlier drafts, and Lewis H. Leicher for his able research assistance.

<sup>1</sup> See, generally, *Report of the Federal Courts Study Committee*, Part I, 4-10 (Apr 2, 1990) ("*Federal Courts Study Committee Report*"); Brookings Task Force on Civil Justice Reform, *Justice for All: Reducing Costs and Delay in Civil Litigation* 1 (Brookings Institution, 1989) ("*Justice for All*"); Arthur R. Miller, *The Adversary System: Dinosaur or Phoenix?*, 69 Minn L Rev 1 (1984); ABA Action Commission to Reduce Court Costs and Delay, *Attacking Litigation Costs and Delay* (American Bar Association, 1984); A. Leo Levin and Denise D. Colliers, *Containing the Cost of Litigation*, 37 Rutgers L Rev 219 (1985). Some writers strongly dispute the idea that there is anything out of the ordinary in the federal court caseload, or certainly anything that deserves to be called a crisis. See, for example, Jack B. Weinstein, *After Fifty Years of the Federal Rules of Civil Procedure: Are the Barriers to Justice Being Raised?*, 137 U Pa L Rev 1901, 1908-10 (1989).

<sup>2</sup> For example, the Administrative Office of the U.S. Courts reports that during the 12-month period ending June 30, 1989, 194,910 civil cases (exclusive of land condemnation, prisoner petitions and deportation reviews) were filed nationwide. Administrative Office of the United States Courts, *Annual Report* 212, Table C5 (1989) ("*1989 Annual Report*"). Of those, 184,937 never completed a trial and were disposed of either with no court action (58,405) or with court action (126,532). *Id.* Of the remaining 9,973 that went to trial, the median time from filing to disposition was 18 months; ten percent of the cases took more than 42 months. *Id.* In some districts, the numbers were notably worse: the District of Massachusetts—28 months (median), 63 months (top ten percent); Northern District of New York—31 months (median), 53 months (top ten percent); Northern District of West Virginia—28 months (median), 57 months (top ten percent); Southern District of Texas—28 months (median), 60 months (top ten percent); Southern District of Indiana—30 months (median), 51 months (top ten percent); Southern District of California—30 months (median), 68 months (top ten percent). *Id.* at 212-14. See also Kenyon D. Bunch and Richard J. Hardy, *A Re-examination of Litigation Trends in the United States: Galanter Reconsidered*, 1986 Mo J of Dispute Resolution 87, 98, 100. But see Marc Galanter, *Reading the Landscape of Disputes: What We Know and Don't Know (and Think We Know) About Our Allegedly Contentious and Litigious Society*, 31 UCLA L Rev 4 (1983). Galanter's article, however, emphasized the question whether we somehow have "too much" litigation now,

pears to be no better.<sup>3</sup> The dissonance between the ideal of civil justice, in which disputing parties are entitled to submit their controversy to a court and have the facts tested in an open trial before a jury, and the reality, in which the costs of litigation and the scarcity of judicial resources end up conferring trials on only five percent of these parties, has reached alarming proportions.<sup>4</sup>

Not surprisingly, this crisis has provoked a number of responses. For example, in November of 1988, Congress commissioned the Federal Courts Study Committee to investigate the problems facing the federal judiciary, with a broad-ranging agenda that included the allocation of business between federal and state courts, the use of specialized tribunals, procedural reforms, alternative methods of dispute resolution, internal management of the courts, and various long range reforms.<sup>5</sup> The Committee issued its final report on April 2, 1990, proposing major changes in the struc-

not whether there is quantitatively more of it than we once had, and not whether the amount is causing systemic problems.

<sup>3</sup> The National Center for State Courts does not report data on times between filing and trial date in its annual report on state court caseload statistics. However, the 1986 report shows a heavy caseload burden for the state courts as a whole. More than 15.7 million new civil cases and 11 million new criminal cases were filed in the state trial courts in 1986. See National Center for State Courts, *State Court Caseload Statistics: 1986 Annual Report* 5 ("1986 State Court Statistics"). Total civil filing trends in general jurisdiction courts demonstrate that the majority of states experienced more than a three percent gain during both the 1984-85 and 1985-86 periods. *1986 State Court Statistics* at 25, Chart 1. Whether this deserves to be called a "crisis" or just a difficult situation may be debatable. However, it is indisputable that the states are also actively seeking solutions to the severe problems of cost and delay that they perceive. For one response to the problem of delay in the state courts, see National Conference of State Trial Judges, *Court Delay Reduction Standards*, reprinted in ABA Lawyers Conference: Task Force on Reduction of Litigation Cost and Delay, *Defeating Delay: Developing and Implementing a Court Delay Reduction Program* 167 (American Bar Association, 1986).

<sup>4</sup> The precise percentage of cases reaching trial in the federal courts in 1989 is 5.12 percent. *1989 Annual Report* at 212, Table C5 (9,973/194,910) (cited in note 2). The ideal suggested in the text can be attributed solely to historical practice (such as the days before what Judith Resnik calls "managerial judging"), or it may be read to suggest that adjudication is still a superior mechanism when it is available, and settlement must be regarded as a necessary evil. See, generally, Judith Resnik, *Managerial Judges*, 96 Harv L Rev 374 (1982); Owen M. Fiss, *Against Settlement*, 93 Yale L J 1073 (1984). Compare Albert W. Alschuler, *Implementing the Criminal Defendant's Right to Trial: Alternatives to the Plea Bargaining System*, 50 U Chi L Rev 931 (1983); and David J. Bazelon, *New Gods for Old: "Efficient" Courts in a Democratic Society*, 46 NYU L Rev 653 (1971), making the same general point about criminal trials versus pre-trial methods of terminating cases. Nevertheless, it is worth remembering that the problem of court congestion and delay is not a new one. See, for example, Hans Zeisel, Harry Kalven, Jr., and Bernard Buchholz, *Delay in the Courts* (Little, Brown & Co., 1959).

<sup>5</sup> Judicial Improvements and Access to Justice Act, Pub L No 100-702, § 102(b), 102 Stat 4642, 4644 (1988). See, generally, *Federal Courts Study Committee Report* (cited in note 1).

ture of the federal court system.<sup>6</sup> On January 25, 1990, Senator Joseph Biden, Chairman of the Judiciary Committee, leading a bipartisan group in the Senate, introduced a bill entitled the Civil Justice Reform Act of 1990.<sup>7</sup> This bill addresses directly the problems of cost and delay in the civil justice system by requiring each federal district to adopt a "civil justice expense and delay reduction plan."<sup>8</sup> As it exists at present, the bill requires each plan to include some system of differentiated case management, greater control by "judicial officers," including both judges and magistrates, over scheduling and discovery, provision for use of alternative dispute resolution mechanisms, and mechanisms for handling any backlog of cases existing in the district. The Biden bill has sparked a spirited debate between the federal judiciary, who generally have urged less "micro-management," and various groups from the plaintiffs' and defense bar, public interest bar and client community, all of whom are searching for a way to go beyond "business as usual."<sup>9</sup>

Notably, both the Federal Courts Study Committee and the Brookings Task Force report, on which the Civil Justice Reform bill was based, identify alternative dispute resolution ("ADR") as one of the approaches that may alleviate the crisis in the civil justice system.<sup>10</sup> Many others have also reached this conclusion.<sup>11</sup> Al-

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<sup>6</sup> *Federal Courts Study Committee Report* (cited in note 1).

<sup>7</sup> S 2027, 101 Cong, 2d Sess, introduced January 25, 1990, in 136 Cong Rec S414. See also HR 3898, 101 Cong, 2d Sess, the companion bill in the House of Representatives, introduced by Rep. Jack Brooks, January 25, 1990, in 136 Cong Rec E75.

<sup>8</sup> S 2027, 136 Cong Rec at 421.

<sup>9</sup> See, for example, in opposition to the bill, the prepared statement of Hon. Aubrey E. Robinson, Jr., Chief Judge, United States District Court for the District of Columbia, on behalf of the Judicial Conference of the United States, before the Committee on the Judiciary, United States Senate, on S 2027, March 6, 1990 (on file with the author); Federal Bar Association Resolution 90-4, opposing S 2027 as written (on file with the author); American Bar Association Resolution opposing S 2027 as written (on file with the author). For statements in favor of the bill, see, generally, *Justice for All* (cited in note 1); and the testimony of Patrick Head (on behalf of the Business Roundtable), Gene Kimmelman (on behalf of the Consumer Federation of America), Bill Wagner (on behalf of the American Trial Lawyers Association), and Stephen B. Middlebrook (on behalf of the American Insurance Association) at the Hearing on S 2027 before the Senate Committee on the Judiciary, March 6, 1990 (on file with the author).

<sup>10</sup> *Federal Courts Study Committee Report* at 24 (cited in note 1); *Justice for All* at 23 (cited in note 1).

<sup>11</sup> See, for example, Albert W. Alschuler, *Mediation with a Mugger: The Shortage of Adjudicative Services and the Need for a Two-Tier Trial System in Civil Cases*, 99 Harv L Rev 1808, 1836-59 (1986); Harry T. Edwards, *Alternative Dispute Resolution: Panacea or Anathema?*, 99 Harv L Rev 668 (1986); Wayne D. Brazil, *A Close Look at Three Court-Sponsored ADR Programs: Why They Exist, How They Operate, What They Deliver, and Whether They Threaten Important Values*, 1990 U Chi Leg F 303; Deborah R. Hensler,

though there seems to be little doubt that some form of ADR may be useful in some cases, a more precise identification of when it is appropriate and how it should be structured is still necessary. The thesis of this Article is that the mandatory court-annexed arbitration programs that the federal courts (and many state courts) are instituting are, in a sense, the wrong cure for what ails those courts. This is not to argue that court-annexed arbitration is all bad. It is only to say that it is probably not addressing the root causes of the civil litigation logjam, and, furthermore, that it is incapable of doing so satisfactorily.<sup>12</sup>

## I. ADR AND CIVIL DISPUTE RESOLUTION

### A. Civil Courts: Outmoded or Overloaded?

To speak of "civil" litigation or civil courts is to recognize some distinction between this branch of law and, on the other hand, criminal and perhaps administrative law. Acknowledging the imperfections inherent in any characterization, it is nonetheless true that civil cases are different in some important ways from criminal cases. For present purposes, there is some value in identifying exactly what makes something a civil dispute, and in asking why we wish to devote public resources to the resolution of that dispute. With a clear idea of the value and purpose of civil litigation, it is possible to evaluate the contributions and detriments of modern, innovative procedures, such as court-annexed arbitration, to see if those procedures are accomplishing the desired purposes.

A civil dispute typically has several characteristics. First, the dispute is generally confined to particular individuals or groups of individuals. The community as a whole is far more interested in

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*Court-Ordered Arbitration: An Alternative View*, 1990 U Chi Legal F 399. See, generally, Stephen B. Goldberg, Eric D. Green and Frank E.A. Sander, *Dispute Resolution* (Little, Brown & Co., 1985); Susan M. Leeson and Bryan M. Johnston, *Ending It: Dispute Resolution in America* 47-162 (Anderson Publishing Co., 1988); Frank E.A. Sander, "Varieties of Dispute Processing," in *Proceedings of the Pound Conference on the Causes of Popular Dissatisfaction with the Administration of Justice*, 70 FRD 79, 111 (1976); Jessica Pearson, *An Evaluation of Alternatives to Court Adjudication*, 7 Just Sys J 420 (1982).

<sup>12</sup> The basic conclusion of the Federal Courts Study Committee was similar. Part I of its report graphically describes the crisis in which the federal courts find themselves, and examines whether an increase in the number of judges would solve it. It accordingly proposes a number of important structural reforms, including the abolition of most diversity jurisdiction, the assignment of many drug cases to the state courts, an expanded exhaustion requirement for state prisoner civil rights cases, increased use of specialized courts, creation of a federal small claims system, and, in some ways, increased ADR. See *Federal Courts Study Committee Report* at 13-26 (cited in note 1). There would have been no need to modify so many parts of the system if ADR alone would have solved the problem.

the manner of a dispute's resolution than in its outcome, that is, in a peaceable rather than violent manner, and in a way that does not create permanent rifts in the community itself. Second, putting the possibility of violence to one side, the community is indifferent to whether a civil dispute is resolved, to the terms on which it is resolved, and to the type of dispute resolution mechanism used. It is enough that both sides accept the legitimacy of the solution and any measures needed to enforce it effectively. Finally, a formal civil dispute that may be entertained in the courts is somehow distinguishable from other interpersonal difficulties; that is, law must exist that addresses (or may address) the problem. Law, of course, is not static, and courts today entertain claims that would have been thought outside the purview of law in earlier days, such as cases about the length of a man's hair, broken social dates or negligent infliction of emotional distress.

In spite of the basically private nature of civil disputes and the wide berth of discretion that the parties enjoy in resolving them, the need to appeal to law to resolve them necessarily implicates public values. Once a case has passed the basic test of whether legal rights or duties are implicated, the parties are no longer the only ones with a stake in its resolution. Whatever the source of the law—judge-made, statutory or constitutional—the court's application of the law in the particular case will have an effect on the law's own development. Thus the community as a whole has a stake in the substantive outcome of the case. Furthermore, to the extent that the methods courts use in discharging their dispute resolution function affect outcomes, the community shares a stake in what those methods are. Ideally, those methods should lead to accuracy in factfinding, to appropriate application of the law, and to acceptance of the court's results, both by the litigants and by the broader community.

Assuming still that civil courts exist for some useful purpose, the question of who has access to those courts is important. To the extent that less than the entire community has access to them, the courts cannot assist in the peaceable resolution of some subset of legal disputes, and the development of the law may become skewed. The access question, in turn, is closely related to the cost of civil litigation. If the costs to the litigant of invoking the aid of the courts are prohibitively high, then the affected people are no better off than if the state actually had abolished civil courts for them.

The denial of access to the courts resulting from high costs is a matter of no moment (apart from questions of economic discrimi-

nation) if civil courts have outlived their usefulness. In that case, however, civil courts should be abolished for all civil disputes, not just those brought by the impecunious. At first glance, it seems that a case for wholesale abolition could be made. After all, most eligible disputes do not end up in court, and of those that do, settlement or summary disposition disposes of the overwhelming majority.<sup>13</sup> If settlement or truncated procedures are good enough for 95 or 99 percent of civil disputes, what justifies retaining civil courts? Individuals with breach of contract claims, tort claims or disputes over property could simply turn to the private dispute resolution market when the tensions of disagreement become unbearable.<sup>14</sup>

What would be lacking in such a world? At the least, the ability to enforce the awards granted by private institutions against recalcitrant parties would be lacking, unless some kind of public institution entitled to exercise force and to take property (or to force action) were available. In addition, some have argued that the public adjudication of the "tip of the iceberg" civil cases creates a public good for litigants, in the form of information about the content of the underlying social rules noted above.<sup>15</sup> The remaining 95 percent of cases would not be so easily resolved if this source of information dried up. Finally, to the extent that private litigation actually implicates fundamental legal rules, whether

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<sup>13</sup> Galanter, 31 UCLA L Rev at 27-28 (cited in note 2); David M. Trubek, Austin Sarat, William L.F. Felstiner, Herbert M. Kritzer and Joel B. Grossman, *The Costs of Ordinary Litigation*, 31 UCLA L Rev 72, 89 (1983); George L. Priest and Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J Legal Stud 1 (1984) (noting that only a very small fraction of disputes come to trial). See also D. Marie Provine, *Settlement Strategies for Federal District Judges* 7 (Federal Judicial Center, 1984), citing Administrative Office of the United States Courts, *Annual Report* 284, Table C4 (1984) ("1984 Annual Report"), showing that only five percent of cases filed in the federal district courts actually go to trial. See note 2.

<sup>14</sup> The private market is active and growing. It includes such well-established institutions as arbitration and mediation associations as well as more recent options such as the "rent-a-judge" program popularized in California. See Endispute, Inc., *Making Alternative Dispute Resolution Work: A Guide for Practicing Lawyers*, reprinted in Administrative Conference of the United States, *Sourcebook: Federal Agency Use of Alternative Means of Dispute Resolution* (1987) ("Federal Agency Sourcebook"); Robert Coulson, *Business Arbitration—What You Need To Know* (American Arbitration Assoc., 1987). See, generally, Richard L. Marcus and Edward F. Sherman, *Complex Litigation: Cases and Materials on Advanced Civil Procedure* 815-36 (West Publishing Co., 1985).

<sup>15</sup> See, for example, Richard A. Posner, *The Summary Jury Trial and Other Methods of Alternative Dispute Resolution: Some Cautionary Observations*, 53 U Chi L Rev 366, 388 (1986); William M. Landes and Richard A. Posner, *Adjudication as a Private Good*, 8 J Legal Stud 235, 240 (1979) (noting the importance of precedent production); Steven Shavell, *The Social Versus the Private Incentives To Bring Suit in a Costly Legal System*, 11 J Legal Stud 333 (1982).

those are rules about the integrity of private property, rules about nondiscrimination or rules about the regulation of markets, lawmakers—either judges or legislators—would be unable to monitor compliance with those rules and devise needed modifications if all civil litigation were privatized.<sup>16</sup>

These considerations suggest that civil litigation today, far from being outmoded, is more necessary than ever. More and more laws of general applicability place important constraints on private behavior. In addition, as noted above, private dispute resolution mechanisms only change the shape and timing of civil litigation; they do not eliminate the need for it altogether. Both the need for statutes providing for the recognition and enforcement of arbitral awards, and the limitations on the enforceability of arbitral awards, sharply illustrate this point.<sup>17</sup>

If civil courts still have a role to play, then the pressures that are driving litigants and disputes away from them require careful examination. This kind of examination will help reveal under what circumstances ADR, and especially court-annexed arbitration, most appropriately substitutes for the civil suit in court, and under what circumstances it is doing so only because the courts are so overcrowded that the litigants have no other practical alternative.<sup>18</sup>

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<sup>16</sup> See, generally, John V. O'Hara, *The New Jersey Alternative Procedure for Dispute Resolution Act: Vanguard of a "Better Way"?*, 136 U Pa L Rev 1723, 1743-51 (1988). The problem of monitoring compliance with legal rules has received attention from the media in the related area of confidential or sealed settlements. In 1988, the *Washington Post* ran a four-part series of articles entitled "Public Courts, Private Justice" that examined the effects of secrecy in civil lawsuits. See Elsa Walsh and Benjamin Weiser, *Court Secrecy Masks Safety Issues; Key GM Fuel Tank Memos Kept Hidden in Auto Crash Suits*, *Washington Post* A1 (Oct 23, 1988); Elsa Walsh and Benjamin Weiser, *Hundreds of Cases Shrouded in Secret; Area Suits Often Sealed With Few Queries*, *Washington Post* A1 (Oct 24, 1988); Benjamin Weiser and Elsa Walsh, *Drug Firm's Strategy: Avoid Trial, Ask Secrecy; Records Reveal Story of Zomax Recall*, *Washington Post* A1 (Oct 25, 1988); Benjamin Weiser and Elsa Walsh, *Secret Filing, Settlement Hide Surgeon's Record; Questions Raised Over Patients' Deaths*, *Washington Post* A1 (Oct 26, 1988). See also Philip H. Corboy, *Masked and Muzzled, Litigants Tell No Evil: Is This Blind Justice?*, *Legal Times* 27 (Jan 8, 1990). The problem is the same in sealed settlements as it is in court-annexed arbitration: the public does not learn what facts give rise to legal claims and under what circumstances, even though the parties obtain a private ruling on their particular case.

<sup>17</sup> See, for example, the Federal Arbitration Act, codified at 9 USC §§ 1-15 (1988). The limitations on enforceability include cases in which the arbitrators exceeded their powers, and those in which the award was procured by fraud or undue means. 9 USC § 10 (1988).

<sup>18</sup> A similar call for a better understanding of ADR appears in Jethro K. Lieberman and James F. Henry, *Lessons from the Alternative Dispute Resolution Movement*, 53 U Chi L Rev 424, 438 (1986). This need for a better understanding is especially pressing if, as Deborah Hensler argues in her article in this issue, urban litigants frequently find themselves excluded from conventional adjudication. Hensler, 1990 U Chi Legal F at 408 (cited in note 11).



## B. A Taxonomy of Civil Dispute Resolution Mechanisms

Although others have suggested ways of classifying methods of dispute resolution,<sup>19</sup> it is helpful here to offer a slightly different taxonomy. This exercise both locates court-annexed arbitration in the broader landscape of court and alternative procedures, and begins to suggest the criteria against which court-annexed arbitration should be assessed.

In a small percentage of cases, the disputants regard the courts as an essential resource, and they persevere to the bitter end, participating in trials and sometimes even appealing their cases to higher courts. This group represents "traditional court litigation." Until relatively recently, ADR techniques were absent from such cases.<sup>20</sup> Court procedures continue to serve as the yardstick against which other systems are measured, and therefore these cases, while not requiring discussion here, deserve mention. In a related group of cases, disputants formally commence a suit in court, not with the expectation that they will actually have a trial, but instead with the expectation that the case will terminate with a consensual settlement. These are the "settlement-oriented court cases." In a third class of cases, the parties freely choose in advance of any dispute to resolve their differences using a more or less formal "alternative" method of dispute resolution, such as arbitration or mediation, without involving the courts at all. These cases employ "voluntary" or "independent" ADR. Finally, and most recently, a group of cases has arisen in which the disputants file their suit in court expecting full adjudication, but the court diverts the case onto a "mandatory settlement" or "non-trial" adjudicatory track. Normally in these cases, those who are determined to reach their ultimate day in court may do so, but only after the delay and expense caused by mandatory participation in the court-sponsored ADR procedures.

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<sup>19</sup> Typical ways of organizing the subject appear in Goldberg, Green & Sander, *Dispute Resolution* (cited in note 11), and Leeson & Johnston, *Ending It* (cited in note 11). See also Provine, *Settlement Strategies* (cited in note 13) for a discussion of a variety of tools federal district judges may use to promote settlement.

<sup>20</sup> The addition of new mandatory ADR procedures to traditional litigation, among which one finds the court-annexed arbitration procedures that are the subject of this article, has changed court adjudication significantly. In addition, the remedies that have been adopted in some complex cases have sometimes employed non-judicial personnel. The Asbestos Claims Settlement Facility, described in Marcus & Sherman, *Complex Litigation* at 834-36 (cited in note 14), is one example. See also Francis E. McGovern, *Toward a Functional Approach for Managing Complex Litigation*, 53 U Chi L Rev 440 (1986).

The second and third categories—settlement-oriented court cases and independent ADR—are fundamentally similar, differing only in whether the agreement to resolve a case privately occurs after the suit is filed or before it arises. Both categories have existed for centuries. Guilds operated arbitration services, organized markets used a form of arbitration and mediation existed in all forms of society.<sup>21</sup> Although the common law courts were hostile to suits to compel enforcement of an agreement to arbitrate future disputes until the early twentieth century, it appears that they willingly enforced final arbitral awards.<sup>22</sup> Professor Leo Kanowitz suggests that courts' unwillingness to enforce executory agreements to arbitrate may have represented an effort to avoid allowing settlement or ADR to "prevent judges from performing their duty to interpret and implement the values embodied in constitutions, statutes, and other authoritative texts."<sup>23</sup>

My explanation is somewhat simpler. The common law courts apparently wanted unfettered consent to the non-judicial dispute resolution process. A person could opt out of an arbitral procedure at any time prior to its commencement, even if he or she had agreed to use it at an earlier point in time. If objections to the avoidance of courts arose only after the winner and loser were named, however, the courts generally gave them little weight.

The much-trumpeted change in the courts' current attitude toward arbitration therefore appears to be a shift in the concept of consent. Rather than thinking there is something magical about consenting to the forum at the time a dispute arises, courts have come to consider an executory agreement regarding arbitration to be just as valid as an agreement on any other subject matter.<sup>24</sup>

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<sup>21</sup> John R. Allison reviewed the early history of arbitration in *Antitrust Agreements and Antitrust Claims: The Need for Enhanced Accommodation of Conflicting Public Policies*, 64 NC L Rev 219, 222-25 (1986). See also Leeson & Johnston, *Ending It* at 47-49 (cited in note 11); A.W. Brian Simpson, *Contracts for Cotton to Arrive: The Case of the Two Ships Peerless*, 11 Cardozo L Rev 287, 321-22 (1989); William L.F. Felstiner, *Influences of Social Organization on Dispute Processing*, 9 L & Soc Rev 63 (1974); Melvin Aron Eisenberg, *Private Ordering Through Negotiation: Dispute-Settlement and Rulemaking*, 89 Harv L Rev 637, 640-42.

<sup>22</sup> See, for example, Leo Kanowitz, *Alternative Dispute Resolution and the Public Interest: The Arbitration Experience*, 38 Hastings L J 239, 251-52 (1987).

<sup>23</sup> Id at 252, referring to the scholarship of Owen M. Fiss in, for example, *Against Settlement*, 93 Yale L J 1073, 1085 (1984).

<sup>24</sup> In the federal courts, Congress prompted this change in attitude through its enactment in 1925 of the Federal Arbitration Act, codified at 9 USC §§ 1-15 (1988), which makes agreements to arbitrate that are in or that affect interstate commerce enforceable. 9 USC § 2 (1988).

Indeed, arbitration has recently become the darling of the Supreme Court. In case after case, the Court has found agreements to arbitrate future disputes enforceable, no matter how "public" the area of law implicated and no matter how unfamiliar the agreed forum seems.<sup>25</sup> Thus, in terms of the broader interests in civil litigation noted above, parties are entitled to waive in advance their right to present certain defined disputes to the civil courts, as long as the agreement between them is otherwise enforceable. This is consistent with the long tradition holding that a defendant with a good objection to the personal jurisdiction of a forum may waive the point, formerly by submitting to the court's general jurisdiction, and today in federal court by failing to raise the issue in a timely fashion.<sup>26</sup> The trend toward permitting arbitration of public law questions, like compliance with the antitrust and securities laws, is not without its risks,<sup>27</sup> and is troublesome given the public functions of civil litigation discussed above. For purposes of this preliminary classification, however, the key feature of agreements to arbitrate is their consensual, non-judicial nature. Analogies between this form of private adjudication and the court-sponsored mandatory programs must be drawn with great care.<sup>28</sup>

Classical arbitration is not, however, the only form of voluntary dispute resolution available today. Many of the mainstays of the ADR movement also fit this description. These include early neutral evaluation ("ENE"), which leads to a recommendation about the kind of procedure best suited to the case; voluntary mediation or "confidential listening" programs; private ("rent-a-

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<sup>25</sup> See, for example, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 US 614 (1985); *Dean Witter Reynolds, Inc. v. Byrd*, 470 US 213 (1985); *Perry v. Thomas*, 482 US 483 (1987); *Shearson/American Express, Inc. v. McMahon*, 482 US 220 (1987). The Court continues to insist, however, on the genuineness and binding quality of the basic agreement to arbitrate. See, for example, *AT&T Technologies v. Communications Workers*, 475 US 643 (1986); *Volt Information Sciences v. Board of Trustees*, 489 US 468 (1989) (arbitration in a case involving third parties not compelled where the litigants had agreed to abide by California law, which permits courts to stay arbitration pending resolution of litigation involving third parties).

<sup>26</sup> See FRCP 12(h)(1); *Insurance Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 US 694 (1982) (holding that the defendant's failure to respond to the plaintiff's discovery requests on the personal jurisdictional issue allowed the court to decide the issue against him).

<sup>27</sup> See Thomas E. Carbonneau, *The Reception of Arbitration in United States Law*, 40 Me L Rev 263 (1988).

<sup>28</sup> See Dwight Golann, *Making Alternative Dispute Resolution Mandatory: The Constitutional Issues*, 68 Or L Rev 487 (1989).

judge") trials; and voluntary mini-trials or summary jury trials.<sup>29</sup> None of these devices differs in principle from the option that parties have always had to submit their dispute to arbitration *after* it was filed in court, even though some invoke arbitration prior to formal filing and others afterwards.

The leap from consensual forms of ADR—court-sponsored or independent—to mandatory use of ADR seems at first glance to be a great one. To borrow a phrase from water law, however, the process has been more like accretion than avulsion. Court-annexed ADR would have made little sense in the pre-1938 world, where complex pleadings initiated a suit, and the next and last meaningful phase was the trial. The Federal Rules of Civil Procedure had the effect of making the pretrial phase of a civil suit a distinct part of the proceeding that at first was left entirely to the parties, but that many now view as something that needs to be controlled and managed by the court.<sup>30</sup> This power has not gone unchallenged in the courts as it has grown.<sup>31</sup> Nonetheless, today district judges have substantial power to compel parties to participate in pretrial proceedings that are designed to assist in the effective management of a case.<sup>32</sup>

Court-annexed arbitration, as it exists in many federal and state courts today, is one of the mandatory settlement procedures or nontrial adjudicatory mechanisms, whichever term seems more apt.<sup>33</sup> As these awkward names imply, it and its fellows (mandatory summary jury trials and mandatory mini-trials) are

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<sup>29</sup> See Erika S. Fine and Elizabeth S. Plapinger, *Overview of Private ADR*, in *ADR and the Courts: A Manual for Judges and Lawyers* (Center for Public Resources, 1987); Brazil, 1990 U Chi Legal F at 303 (cited in note 11).

<sup>30</sup> This change has profoundly affected the idea of the trial. See Richard L. Marcus, *Completing Equity's Conquest? Reflections on the Future of Trial under the Federal Rules of Civil Procedure*, 50 U Pitt L Rev 725 (1989). See also John P. Frank, *The Rules of Civil Procedure—Agenda for Reform*, 137 U Pa L Rev 1883, 1884 (1989); Judith Resnik, 96 Harv L Rev 374 (cited in note 4).

<sup>31</sup> See, for example, *Identiseal Corp. of Wisconsin v Positive Identification Systems, Inc.*, 560 F2d 298 (7th Cir 1977); *Strandell v Jackson County, Ill.*, 838 F2d 884 (7th Cir 1988).

<sup>32</sup> FRCP 16, 26. These powers were substantially enhanced by the 1983 amendments to the Federal Rules. See David L. Shapiro, *Federal Rule 16: A Look at the Theory and Practice of Rulemaking*, 137 U Pa L Rev 1969, 1985 (1989).

<sup>33</sup> I refer to it as a "mandatory settlement mechanism" because the parties have no choice, in the cases to which it applies, about whether or not to use it. They must go through the procedure and decide whether the arbitrator's suggested resolution of the case is satisfactory—that is, whether they will accept the arbitrator's award in settlement of the case. I also refer to it as "nontrial adjudication" to make the point that this is an adjudicatory procedure that deliberately does not follow the forms of court trials. For those who wish to pursue all their options, it is but one step along the road to an ultimate trial.

neither fish nor fowl. Because they are not consensual, the arguments based on consent that support arbitration and related ADR mechanisms are simply out of place. Because they deviate from trial procedures, they lack some of the assurances of fairness and impartiality that formal proceedings contain. Finally, because "successful" arbitrations do not result in a public hearing and record of disposition, these cases do not contribute to the broader development of civil law. If court-annexed arbitration is supportable, it must be either because existing trial mechanisms are unnecessary, or because a certain class of cases can and should be handled differently.

## II. AN EVALUATION OF COURT-ANNEXED ARBITRATION

### A. Background: Evolution of Federal Court Programs

Although court-annexed arbitration is not a new procedure, experiments with its use in the federal courts began only twelve years ago. State courts had been using a variety of court-related arbitration procedures since 1952.<sup>34</sup> A careful review of this experience will set the stage for evaluating the current procedure, and for considering any changes that may be desirable.

In 1976, one of the recommendations at the influential National Conference on the Causes of Popular Dissatisfaction with the Administration of Justice ("Pound Conference") proposed the use of arbitration as a potential remedy for the perceived explosion of cases in both federal and state courts.<sup>35</sup> In 1977, the Justice Department followed up on these proposals with a draft bill that would have authorized from five to eight federal courts to experiment with court-annexed arbitration in specific types of civil

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<sup>34</sup> The first program in the country began in 1952 in Pittsburgh, Pennsylvania. The court identified by rule the types of civil cases that would be reviewed for assignment to court-certified arbitrators. Leeson & Johnston, *Ending It* at 78 (cited in note 11). Between 1952 and 1987, the District of Columbia and 22 states adopted some form of court-annexed arbitration program. *Id.*, citing the National Center for State Courts, *State by State Profiles* (1987).

<sup>35</sup> See Sander, 70 FRD at 131 (cited in note 11). See also Paul Nejelski and Andrew S. Zeldin, *Court-Annexed Arbitration in Federal Courts: The Philadelphia Story*, 42 Md L Rev 787, 798 (1983); E. Allan Lind and John E. Shapard, *Evaluation of Court-Annexed Arbitration in Three Federal District Courts* (cited in note 11), in which Lind and Shapard favorably evaluate state courts' operation of court-annexed arbitration. According to Nejelski and Zeldin, the suggestion of arbitration as a remedy was unrelated to a favorable impression of state programs.

cases.<sup>36</sup> Although that bill did not pass, Congress accomplished the same goal through the back door by funding three pilot programs that began in 1978: one in the Northern District of California, another in the Eastern District of Pennsylvania and the third in the District of Connecticut (which abandoned the experiment after a short time).<sup>37</sup>

The differences among court-annexed arbitration programs, both at the federal and state level, are important. As Marie Provine has pointed out, the goals of the programs vary, and thus the types of procedures and likely effect on the broader judicial process vary as well.<sup>38</sup> In some courts, the goal is very much like that of a summary jury trial—to provide lawyers and their clients with information about the settlement value of a case. In other courts, the frank goal has been to terminate the litigation. As the following discussion demonstrates, the structure of the federal court programs has consistently been designed to provide an end to the suit.

In 1978, the three pilot districts adopted local rules that created a compulsory arbitration program for cases meeting certain eligibility requirements.<sup>39</sup> The pilot programs had two important limitations. First, only cases for money damages were eligible, on the ground that arbitration is not well suited to equitable claims. Second, a cap was placed on the amount in controversy (\$100,000 in the Northern District of California, \$50,000 in the Eastern District of Pennsylvania), on the assumption that larger claims would be more complex and that the parties would have a greater incentive to demand a trial *de novo* if more was at stake.

The Eastern Pennsylvania rule also incorporated a number of additional limitations on the program:

Where the United States is a party, the action must be brought under (1) the Federal Tort Claims Act, (2) the Longshoremen and Harbor Workers Compensation Act, or (3) the Miller Act.

Where the United States is not a party and federal jurisdiction exists, the action must be (1) for injury or death of a seaman under the Jones Act, (2) based on a

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<sup>36</sup> See The Court-Annexed Arbitration Act of 1978: Hearings on S 2253 Before the Subcommittee on Improvements in Judicial Machinery of the Committee on the Judiciary, 95th Cong, 2d Sess 22 (1978) (statement of Griffin B. Bell).

<sup>37</sup> Nejelski & Zeldin, 42 Md L Rev at 799 (cited in note 35).

<sup>38</sup> Provine, *Settlement Strategies* at 44 (cited in note 13).

<sup>39</sup> The discussion that follows refers only to the Pennsylvania and California programs.

negotiable instrument or contract (generally all of which are diversity cases), (3) for personal injury or property damage (also virtually all of which are diversity cases), or (4) for personal injury under the Federal Employees Liability Act.

Cases based on a claimed violation of a right under the Constitution are not included.<sup>40</sup>

The program was administered through the local clerk's office, which notified the parties when their case had to be referred to an arbitration panel. The notice fixed a firm date for a hearing, approximately five months from the date of the notice, and also fixed a 120-day limitation on discovery. The district judge had the power to expand or contract the time for discovery.

At the end of the discovery period the case was ready for arbitration, with one important qualification. The parties were entitled to file a motion for summary judgment or similar relief. If the motion was filed prior to referral, then referral would be postponed until the court ruled on the motion. Such a postponement introduced the risk of new delays in the proceeding. In contrast, the court generally did not stay the arbitration if a dispositive motion was filed after referral. Most cases, as is also true generally, were resolved prior to arbitration.

The procedure for selecting the arbitrators relied entirely on volunteers. The clerk's office compiled a list of arbitrators, selecting from lawyers who met certain minimal qualifications. The volunteers categorized themselves as "plaintiffs' lawyers," "defense lawyers," or "cannot be categorized." If parties wanted to select their own arbitrators, they were not required to use these volunteers. The arbitrators served on panels of three, usually sitting for three hearings a day. Each arbitrator received \$75 per hearing for his or her services. Paul Nejelski and Andrew Zeldin wrote that the Federal Rules of Evidence were used in "an informal manner," citing as an example a relaxation in the formal requirements for document authentication.<sup>41</sup> Written transcripts were not prepared as a matter of course, but a party could request (and pay for) a court reporter.

Panels issued their decisions "promptly" after the hearing by filing an award with the clerk of the court. Either party was then entitled to file, within thirty days, a written demand for a trial de

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<sup>40</sup> Nejelski & Zeldin, 42 Md L Rev at 801 (cited in note 35).

<sup>41</sup> Id at 803.

novo in the district court. Somewhat contradictorily, Nejelski and Zeldin said "[n]o prejudice attaches from the arbitration award. Evidence from the hearing is admissible at trial only for impeachment purposes."<sup>42</sup> However, although "no additional cost is assessed for filing for trial de novo," the moving party had to make a deposit with the court equal to the arbitration fees, that would be lost if the final judgment was not more favorable than the arbitral award.<sup>43</sup> In other words, the arbitration award operated much like an offer of judgment pursuant to FRCP 68.<sup>44</sup>

By 1985, the number of federal districts using court-annexed arbitration had expanded to ten—the original two that retained their pilot programs plus eight new districts.<sup>45</sup> Three years later, in Title IX of the Judicial Improvements and Access to Justice Act, Congress finally provided statutory authority for court-annexed arbitration in selected federal courts and outlined some of the procedural rules that such programs would have to follow.<sup>46</sup>

Congress's embrace of court-annexed arbitration in the Judicial Improvements Act was cautious. The statute continues to treat arbitration as an experimental program, although it draws on both the federal court experiences outlined above and state court experiences.<sup>47</sup> Twenty districts will eventually participate in the new program: the ten specified in section 658(1) of the statute, and ten to be selected by the Judicial Conference, pursuant to section 658(2).<sup>48</sup> Section 651(a) allows each of the 20 district courts de-

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<sup>42</sup> Id at 804, citing ED Pa R Civ P 8.7(c).

<sup>43</sup> Id, citing ED Pa R Civ P 8.2, 8.7(d).

<sup>44</sup> Present Rule 68 allows a defendant to make a formal offer of judgment to the plaintiff. If the plaintiff refuses the offer and the ultimate judgment is "not more favorable than the offer," the offeree must pay the costs incurred after the offer was made. FRCP 68. See *Marek v Chesny*, 473 US 1 (1985). For a discussion of the economic effects of the rule, see Geoffrey P. Miller, *An Economic Analysis of Rule 68*, 15 J Legal Stud 93 (1986).

<sup>45</sup> Patricia A. Ebener and Donna R. Betancourt, *Court-Annexed Arbitration: The National Picture* 6 (RAND Institute for Civil Justice, 1985). The ten districts with planned or ongoing programs were the Northern District of California, the Middle District of Florida, the Western District of Michigan, the Western District of Missouri, the District of New Jersey, the Middle District of North Carolina, the Western District of Oklahoma, the Eastern District of Pennsylvania, and the Southern and Western Districts of Texas. See also A. Leo Levin and Deirdre Golash, *Alternative Dispute Resolution in Federal District Courts*, 37 U Fla L Rev 29, 32-36 (1985).

<sup>46</sup> Pub L No 100-702, Title IX (cited in note 5), codified at 28 USCA §§ 651-58 (West 1968 & Supp 1990).

<sup>47</sup> For a review of state court programs, see NCSC, *State by State Profiles* (cited in note 34).

<sup>48</sup> Section 658(1) selects the following districts for the full program: the Northern District of California, the Middle District of Florida, the Western District of Michigan, the Western District of Missouri, the District of New Jersey, the Eastern District of New York,



scribed in section 658 to "authorize by local rule the use of arbitration in any civil action, including an adversary proceeding in bankruptcy."

Whether the district court has the power to require arbitration, however, depends upon whether Congress specifically named the district or whether the Judicial Conference selected it. Districts that Congress named are empowered to refer civil actions to arbitration when the parties consent, *and* they may:

require the referral to arbitration of any civil action pending before it if the relief sought consists only of money damages not in excess of \$100,000 or such lesser amount as the district court may set, exclusive of interest and costs.<sup>49</sup>

In an interesting contrast to the amount in controversy rules that prevail in diversity cases,<sup>50</sup> the arbitration statute states that "[f]or purposes of paragraph (1)(B), a district court may presume damages are *not* in excess of \$100,000 unless counsel certifies that damages exceed such amount."<sup>51</sup> Finally, if one of the named districts had a local rule on the date of the statute's enactment providing for a limitation on money damages of \$150,000 for court-annexed arbitration, section 901(c) of the Act permits that district to retain the higher ceiling.

In addition, the statute defines certain classes of cases that may *not* be referred to arbitration, even if they otherwise fall within the scope of section 652(a)(1)(B): (1) actions based on "an alleged violation of a right secured by the Constitution," and (2) actions in which jurisdiction is based on 28 USC § 1343 (civil

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the Middle District of North Carolina, the Western District of Oklahoma, the Eastern District of Pennsylvania, and the Western District of Texas. With the exception of the Eastern District of New York, these are the same districts that were operating programs in 1985. The list does not include the Southern District of Texas from the 1985 group.

Section 658(2) requires the Judicial Conference of the United States to add ten additional districts to the list, and to notify the Federal Judicial Center and the public of the districts chosen. The Conference has named the following districts: the Western District of Washington, the Middle District of Georgia, the Western District of Kentucky, the Northern District of New York, the Western District of New York, the Western District of Pennsylvania, the Eastern District of Texas, the Western District of Virginia, the District of Utah, and the Bankruptcy Court of the Southern District of Indiana. Telephone interview with Gloria Chamot, Federal Judicial Center, Aug 28, 1990.

<sup>49</sup> 28 USCA § 652(a)(1)(B) (West 1968 & Supp 1990).

<sup>50</sup> See *St. Paul Mercury Indemnity Co. v. Red Cab Co.*, 303 US 283, 288-89 (1938), which establishes the rule that "[i]t must appear to a legal certainty that the claim is really for *less* than the jurisdictional amount to justify dismissal." (Emphasis added.)

<sup>51</sup> 28 USCA § 652(a)(2) (West 1968 & Supp 1990).

rights and elective franchise).<sup>52</sup> Beyond these general prohibitions, the district courts must also issue local rules establishing procedures for exempting cases from arbitration, *sua sponte* or on a party's motion,

in which the objectives of arbitration would not be realized—

(1) because the case involves complex or novel legal issues,

(2) because legal issues predominate over factual issues, or

(3) for other good cause.<sup>53</sup>

Both the districts named by Congress and those named by the Judicial Conference may permit court-annexed arbitration by consent.<sup>54</sup> Local rules must assure that consent to arbitration is freely and knowingly obtained, and that no party or attorney is prejudiced for refusing to participate in it.<sup>55</sup> No general public interest exceptions exist that are analogous to the specific exceptions for constitutional and civil rights claims in the mandatory arbitration procedure.

The statute also establishes some procedural rules for arbitration conducted under its authority.<sup>56</sup> Most important, perhaps, is the provision governing the selection of arbitrators. The district courts enjoy virtually unfettered discretion to "establish standards for the certification of arbitrators," as long as the arbitrators take the oath or affirmation described in 28 USC § 453 and are subject to the disqualification rules of 28 USC § 455.<sup>57</sup> Arbitrators are in-

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<sup>52</sup> 28 USCA § 652(b) (West 1968 & Supp 1990).

<sup>53</sup> 28 USCA § 652(c) (West 1968 & Supp 1990).

<sup>54</sup> For districts named in the statute, see 28 USCA §§ 651(a), 652(a)(1)(A), 658(1) (West 1968 & Supp 1990); for districts designated by the Judicial Conference, see 28 USCA §§ 651(a), 652(a)(1)(A), 658(2) (West 1968 & Supp 1990). This provision is a little peculiar, since many believed that the district courts had power to permit consensual court-annexed arbitration without a new statute. See FRCP 16(c)(7). The statute may, however, have been designed to clarify this question, since some courts had taken a stricter view of the matter. See, for example, *Strandell*, 838 F2d 884.

<sup>55</sup> 28 USCA § 652(d) (West 1968 & Supp 1990).

<sup>56</sup> 28 USCA §§ 653, 654, 656 and 657 (West 1968 & Supp 1990).

<sup>57</sup> 28 USCA § 656 (West 1968 & Supp 1990). The oath in section 453 is the general oath or affirmation taken by each justice or judge of the United States. The standards in section 455 require the disqualification of justices, judges, or magistrates in any case in which their impartiality might be questioned, or in a variety of other particular circumstances in which the judge has an actual interest in the litigation (financial or otherwise). See 28 USC §§ 453, 455 (1988).

dependent contractors for purposes of federal law.<sup>58</sup> Finally, the district courts must establish and pay compensation to arbitrators, within any limits that the Judicial Conference may set.<sup>59</sup>

The statutory provisions concerning the arbitrator's powers are short and to the point. The arbitrator shall have the power, within the district where the referring court is located:

- (1) to conduct arbitration hearings,
- (2) to administer oaths and affirmations, and
- (3) to make awards.<sup>60</sup>

In addition, the provisions of Rule 45 concerning subpoenas for the attendance of witnesses and the production of documentary evidence are applicable to the arbitration hearing.<sup>61</sup>

The hearing itself must begin no later than either 180 days after the filing of the answer or 30 days after the court's ruling on certain dispositive motions.<sup>62</sup> The statute offers no other guidance on the ways in which hearings should be conducted. Though section 902 authorizes the Judicial Conference to develop model rules relating to procedures for arbitration, apparently those rules would not be mandatory for districts participating in the program.<sup>63</sup> In practice, hearings have tended to be more informal, with relaxed evidentiary rules, a less structured relationship between the parties and the attorneys, a more accessible role for the arbitrator and, obviously, no juries.

At the conclusion of the procedure, the arbitrator issues an award, either specifying the amount of money the defendant owes or stating that plaintiff takes nothing. The award must be filed promptly with the clerk of the district court, along with proof of service to the other party.<sup>64</sup> If neither party exercises his or her

<sup>58</sup> 28 USCA § 656(b). As such they are subject to the provisions of 18 USC §§ 201-211, which relate to bribery, graft and conflicts of interest for public officials. 18 USC §§ 201-211 (1988).

<sup>59</sup> 28 USCA § 657(a). Those compensation levels have been extremely low, as noted above. See, generally, Elizabeth Rolph, *Introducing Court-Annexed Arbitration: A Policymaker's Guide* (RAND Institute for Civil Justice, 1984).

<sup>60</sup> 28 USCA § 653(a) (West 1968 & Supp 1990).

<sup>61</sup> 28 USCA § 653(c) (West 1968 & Supp 1990); FRCP 45.

<sup>62</sup> 28 USCA § 653(b) (West 1968 & Supp 1990). These motions are a motion to dismiss the complaint, a motion for judgment on the pleadings, a motion to join necessary parties, or a motion for summary judgment. See FRCP 12(b)(6), 12(c), 12(b)(7), 56. Any such motion must have been filed within the time period specified by the court. The statutory time periods are subject to modification by the court "for good cause shown." 28 USCA § 653(b) (West 1968 & Supp 1990).

<sup>63</sup> Pub L No 100-702, § 902, 102 Stat at 4663 (cited in note 5).

<sup>64</sup> 28 USCA § 654 (West 1968 & Supp 1990).

right to demand a trial de novo,<sup>65</sup> the award is entered as the judgment of the court. With respect to the effect of the judgment, the statute provides:

The judgment so entered shall be subject to the same provisions of law and shall have the same force and effect as a judgment of the court in a civil action, except that the judgment shall not be subject to review in any other court by appeal or otherwise.<sup>66</sup>

This language indicates that the arbitral award, no matter how detailed or terse, carries with it both claim and issue preclusive effects.

Arbitral awards are, however, subject to confidentiality limitations similar to those available to settlement discussions prior to the entry of judgment on an award. Section 654(b) states that

[t]he district court shall provide by local rule that the contents of any arbitration award made under this chapter shall not be made known to any judge who might be assigned to the case—

(1) except as necessary for the court to determine whether to assess costs or attorney fees under section 655,

(2) until the district court has entered final judgment in the action or the action has been otherwise terminated, or

(3) except for purposes of preparing the report required by section 903(b) of [the Act].<sup>67</sup>

Thus, the statute guarantees confidentiality only vis-à-vis any judge who might hear the case de novo, for the purposes of that hearing. It is silent about the confidentiality of the record in the proceeding, and about the status of materials that are produced in connection with the arbitral discovery process.

The new statute, like the experimental programs before it, guarantees parties the right to trial de novo in the district court.<sup>68</sup> However, and again typically, the assertion of this right is not costless. First, in any case falling within the mandatory arbitration limits, the cost of asserting the right to a trial in the Article III

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<sup>65</sup> See 28 USCA § 655 (West 1968 & Supp 1990).

<sup>66</sup> 28 USCA § 654(a) (West 1968 & Supp 1990).

<sup>67</sup> 28 USCA § 654(b) (West 1968 & Supp 1990).

<sup>68</sup> 28 USCA § 655 (West 1968 & Supp 1990).

court is increased by the additional costs attributable to the arbitration. Second, the district court is entitled to provide by local rule that arbitrator fees paid under section 657 "may be taxed as costs against the party demanding the trial de novo." Fees will be taxable as costs unless the party demanding the trial "obtains a final judgment more favorable than the arbitration award," or "the court determines that the demand for the trial de novo was made for good cause."

This structure is again similar to Rule 68.<sup>69</sup> The important difference is that under Rule 68 the party who fails to obtain a judgment more favorable than the defendant's offer must pay "the costs incurred after the making of the offer," while under section 655(d) the penalty is the amount of the arbitrator's fee. Another difference is that, under section 655(d), even if the final judgment is not more favorable than the arbitration award, the penalty may not ensue if the court determines that the demand for a trial de novo was made for good cause. For arbitrations by consent, the statute has a potentially stronger disincentive for demanding a trial de novo. In those cases, the district court may assess both costs and "reasonable attorneys' fees" against the party demanding the trial de novo, if

(1) such party fails to obtain a judgment, exclusive of interest and costs, in the court which is substantially more favorable to such party than the arbitration award, and

(2) the court determines that the party's conduct in seeking a trial de novo was in bad faith.<sup>70</sup>

Since Title IX is a pilot program, it also contains provisions for reviewing its success or failure. Section 903(a) requires the Director of the Administrative Office of the U.S. Courts to include "statistical information" about the court-annexed arbitration programs in its annual report.<sup>71</sup> Section 903(b) sets out the requirements for the final report. The information called for tends to be subjective in nature, including, for example, "the level of satisfaction with the arbitration programs . . . by a sampling of court personnel, attorneys, and litigants"; "the levels of satisfaction relative to the cost per hearing of each program"; and "a summary of . . .

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<sup>69</sup> See note 44.

<sup>70</sup> 28 USCA § 655(e) (West 1968 & Supp 1990).

<sup>71</sup> Pub L No 100-702, § 903(a), 102 Stat at 4663 (cited in note 5). The statute does not specify the types of statistical information contemplated.

program features . . . identified as being related to program acceptance."<sup>72</sup>

What is missing from Title IX, although the final reports could cure this on their own initiative, is a sound comparison between the arbitrated cases and the general pool of cases. It is well known that many cases in which \$100,000 or \$150,000 is at stake settle at present even without arbitration.<sup>73</sup> Only with a group of control cases that permit a valid comparison between arbitration and court results achieved by different styles of judicial management will it be possible to tell whether the pilot court-annexed arbitration program should be continued or not, from both the objective (cost-based) standpoint and from the standpoint of fairness, client satisfaction and public interest.

## B. Judicial Review of Court-Annexed Arbitration

With only occasional exceptions, the federal courts have been overwhelmingly hospitable to the ADR family that includes court-annexed arbitration, mandatory settlement conferences and summary jury trials. Through the device of refusing to cooperate with the program in question, parties have raised claims under the Seventh Amendment, the due process clause (and its equal protection component), the Rules Enabling Act and Rules 16 and 83 of the Federal Rules of Civil Procedure. However, these across-the-board challenges to the constitutional, statutory or rule-based authority for the programs have not generally succeeded.

### 1. *Inherent Power to Manage Dockets.*

The court-sponsored mandatory ADR mechanisms have a number of points in common. All of them take place during the pretrial phase of a civil proceeding; none of them cuts off a party's right to demand a traditional trial in court, before a jury, if appropriate. Thus, arguments for or against court-annexed ADR must begin by taking a position on the scope of a district court's power to control its own docket. If that power is broad, then it is difficult to see why court-annexed ADR does not fall within it; if that

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<sup>72</sup> Id.

<sup>73</sup> See Hensler, 1990 U Chi Legal F at 407 (cited in note 11); and notes 2, 4 and 12. Studies of litigation satisfaction show that people seem to like court-annexed arbitration. See Christopher Simoni, Michael B. Wise and Michael Finigan, *Litigant and Attorney Attitudes Toward Court-Annexed Arbitration: An Empirical Study*, 28 Santa Clara L Rev 543 (1988).

power is narrower, there is more room to argue that ADR is inherently flawed.

The Supreme Court has recognized an inherent power to control dockets apart from any particular powers the courts may have under the Judicial Code or the Federal Rules of Civil Procedure.<sup>74</sup> Most recently, in *Newman-Green, Inc. v Alfonzo-Larrain*,<sup>75</sup> the Court found that this type of inherent power underlay the power of the court of appeals to grant a motion to dismiss a dispensable party whose presence spoils statutory diversity jurisdiction. In a case involving an order requiring a litigant to appear in person at a pretrial settlement conference, the Seventh Circuit, sitting en banc, wrote that the inherent power to manage dockets

likewise forms the basis for continued development of procedural techniques designed to make the operation of the court more efficient, to preserve the integrity of the judicial process, and to control courts' dockets.<sup>76</sup>

This power was limited, in the court's view, only by the "obvious" observation that it could not be exercised "in a manner inconsistent with rule or statute."<sup>77</sup>

The Seventh Circuit's strong presumption in favor of inherent management power is typical of other courts. For example, in *Matter of Sanction of Baker*,<sup>78</sup> the Tenth Circuit found broad power to impose sanctions for refusals to cooperate with pretrial orders. District courts have relied in part on this concept of inherent power to uphold, among other things, orders enforcing strict time limits,<sup>79</sup> orders requiring participation in summary jury trials<sup>80</sup> and orders

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<sup>74</sup> See, for example, *Roadway Express, Inc. v Piper*, 447 US 752, 764-67 (1980); *Link v Wabash Railroad Co.*, 370 US 626, 630-31 (1962) ("The authority of a court to dismiss *sua sponte* for lack of prosecution has generally been considered an inherent power governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.").

<sup>75</sup> 109 S Ct 2218, 2224 (1989). The inherent power ruling was in the alternative. The Court first found that FRCP 21 authorized the appellate action. *Id.* at 2223. Two justices, Kennedy and Scalia, dissented on the ground that the power was not inherent after all, and that Rule 21 could not be used since the Federal Rules must not be construed to expand a court's jurisdiction (FRCP 82). The dissenting opinion would require more specific authority from Congress. *Id.* at 2226 (Kennedy, with whom Scalia joined, dissenting).

<sup>76</sup> *G. Heileman Brewing Co. v Joseph Oat Corp.*, 871 F2d 648, 651 (7th Cir 1989).

<sup>77</sup> *Id.* at 652.

<sup>78</sup> 744 F2d 1438, 1441 (10th Cir 1984).

<sup>79</sup> See *United States v Reaves*, 636 F Supp 1575 (ED Ky 1986).

<sup>80</sup> See, for example, *Federal Reserve Bank of Minneapolis v Carey-Canada, Inc.*, 123 FRD 603, 604 (D Minn 1988).

requiring participation in settlement conferences.<sup>81</sup> The idea that pretrial procedures are somehow optional for the litigants, and may be disregarded by the parties if authority for each order is not precisely spelled out in statutes or rules, was probably never correct; in any event, there is little or no support for it today.

Notwithstanding the broad managerial power that district judges enjoy today,<sup>82</sup> it remains true that a distinction exists between managing adjudication, which is desirable, and mandating outcomes, which is impermissible. Occasionally, when judges have become too aggressive, appellate courts have been forced to remind them that management does not mean coercing settlements.<sup>83</sup> Furthermore, the availability of nontraditional procedures to assist settlement does not mean by some parity of reasoning that procedural and evidentiary rules at formal hearings before the court may be disregarded.<sup>84</sup> Inherent powers, in short, have their limits, and the court-sponsored ADR programs must stay within those limits.

## 2. *Seventh Amendment Challenges.*

On a more specific level, court-annexed arbitration and its sister procedures have been attacked as inconsistent with the Seventh Amendment. Even though a jury trial is theoretically possible in the trial following arbitration, the trial is delayed and becomes more expensive for the parties asserting the right. No court to date, however, has struck down a court-sponsored ADR program on this ground, even though there is some validity to both criticisms.

The most comprehensive analysis of the Seventh Amendment issue occurs in an early district court opinion on court-annexed arbitration. In the case of *Kimbrough v Holiday Inn*,<sup>85</sup> the court, relying in part on an earlier decision of the Supreme Court of Pennsylvania,<sup>86</sup> decided that the critical question was whether the court-annexed arbitration procedure placed unduly burdensome conditions on the right to the jury trial. In evaluating the burdens, the court also considered the benefits provided by the arbitration programs, including the opportunity to test the validity of claims promptly before a neutral arbiter, the enhanced likelihood of set-

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<sup>81</sup> See *Lockhart v Patel*, 115 FRD 44 (ED Ky 1987).

<sup>82</sup> See Resnik, 96 Harv L Rev 374 (cited in note 4).

<sup>83</sup> See *Kothe v Smith*, 771 F2d 667 (2d Cir 1985).

<sup>84</sup> *Proimos v Fair Automotive Repair, Inc.*, 808 F2d 1273, 1278 (7th Cir 1987).

<sup>85</sup> 478 F Supp 566, 570 (ED Pa 1979).

<sup>86</sup> *Application of Smith*, 381 Pa 223, 112 A2d 625 (1955).



tlement, and the streamlining of the case.<sup>87</sup> The greatest burden it found was the potential expense of a full-blown arbitration hearing—a cost of jury trial that would not be borne in the absence of this procedure. Nonetheless, the court concluded that, on balance, court-annexed arbitration did not place an unconstitutional burden on Seventh Amendment rights.<sup>88</sup>

In light of the general approach that the Supreme Court has taken toward the Seventh Amendment—that is, reading it to preserve the essential aspects of the common law right to jury trial, but not the particular details of the 1791 practice<sup>89</sup>—the *Kimbrough* court seems clearly correct. If the delays and expense attributable, for example, to court-annexed arbitration amounted to a Seventh Amendment violation, then the entire structure of pretrial discovery and pretrial conferences would seem equally vulnerable. The courts should, and by general consensus do, have the right to insist that the public resources consumed by a civil jury trial be spent wisely. Thus, before the trial begins, the case must be adequately prepared, and the court must be convinced that the parties do not wish to settle the dispute in a truly voluntary manner. Court-annexed arbitration can advance both of those goals in much the same way as other aspects of pretrial procedure. There is no reason to create an expansive reading of the Seventh Amendment that would call so much into question.

### 3. Federal Statutes and Rules.

The 1988 legislation described above has put to rest most of the statutory and rule-based objections to the experimental court-annexed arbitration programs in the federal courts.<sup>90</sup> The one noteworthy decision that had struck down a mandatory court-sponsored ADR program was the Seventh Circuit's ruling in *Strandell v Jackson County*.<sup>91</sup> The district judge there ordered the parties to participate in a summary jury trial. The plaintiffs' law-

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<sup>87</sup> *Kimbrough*, 478 F Supp at 571.

<sup>88</sup> See also *Rhea v Massey-Ferguson*, 767 F2d 266, 268-69 (6th Cir 1985); *New England Merchants Bank v Hughes*, 556 F Supp 712, 714 (ED Pa 1983).

<sup>89</sup> See, generally, *Beacon Theatres, Inc. v Westover*, 359 US 500 (1959); *Dairy Queen, Inc. v Wood*, 369 US 469 (1962); *Ross v Bernhard*, 396 US 531 (1970).

<sup>90</sup> I say "most objections" because the legislation, as noted above in note 4, also authorized the ten programs that will be limited to consensual arbitration. If this is for clarification or funding purposes, then no broader questions arise. If, on the other hand, it implies that in the absence of statutory authorization districts do not have power to conduct consensual pretrial arbitrations, then questions about the scope of FRCP 16 and the Rules Enabling Act, 28 USC §§ 2072-74, will continue to be important.

<sup>91</sup> 838 F2d 884 (7th Cir 1988).

yer refused, stating that he was ready to go to trial and that he did not want to disclose privileged materials at the summary proceeding. When the lawyer did not appear at the scheduled summary jury trial, the district court held him in criminal contempt. On appeal, the Seventh Circuit found that Rule 16 did not authorize the mandatory use of the summary jury trial, and it also expressed concern about the influence the procedure would have on privileges from discovery.

*Strandell* was widely criticized by other district courts and does not appear to have been followed in any other circuit.<sup>92</sup> In a brief *per curiam* opinion, the Sixth Circuit upheld a mandatory mediation program against challenges under the Seventh Amendment and Federal Rules of Civil Procedure 38(b) (jury demand), 39(a) (docketing as a jury case), 53 (use of masters), and 72-76 (use of magistrates).<sup>93</sup> Lack of authority under the statutes or rules is, in any event, easily curable if the political desire to experiment with these programs is present. Given the new federal legislation, this issue seems destined to die.

#### 4. *Due Process.*

The most difficult legal question remaining about court-annexed arbitration and the mandatory ADR procedures is their consistency with due process. The process that is required in general for civil cases is less clear than for their criminal counterparts. Furthermore, due process problems can arise in individual cases even if one concludes that court-annexed arbitration is, in general, compatible with due process norms.

Unless one could show that mandatory ADR deprives people of their day in court or otherwise distorts the trial *de novo*, it would be difficult to argue that it violates due process on its face. After all, programs such as court-annexed arbitration give litigants more procedure, not less, and ensure access to a trial *de novo*. The interesting questions arise in two areas: what features should the arbitral process include to assure due process, and how, if at all, might the arbitral hearing affect the trial on the merits? Finally, moving beyond the individual rights perspective of due process, the systemic effects of court-annexed arbitration must be considered.

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<sup>92</sup> See, for example, *Federal Reserve Bank*, 123 FRD 603; *McKay v Ashland Oil Co.*, 120 FRD 43 (ED Ky 1988). See also *Dvorak v Shibata*, 123 FRD 608 (D Neb 1988) (regarding mandatory settlement conferences).

<sup>93</sup> *Rhea*, 767 F2d 266.

*Procedural quality of arbitral hearings.* Since the goal of court-annexed arbitration is to produce a final resolution of the dispute as often as possible, the hearing provided must comport with due process norms.<sup>94</sup> This means, as usual, notice and an opportunity to be heard before an impartial tribunal. Since the greatest difference between court-annexed arbitration and other forms of judicial or administrative civil dispute resolution is the decisionmaker, it makes sense to begin an evaluation of procedural quality there.

Although arbitrators in private, consensual proceedings need not be impartial decisionmakers,<sup>95</sup> this is not and cannot be the case for court-sponsored proceedings. Indeed, in *Morelite Construction Corp. v New York City District Council Carpenters Benefit Funds*,<sup>96</sup> the court commented in dictum that the impartiality standards that had been adopted for the original three court-annexed arbitration programs matched those that are applicable to federal judges. Congress was obviously alert to this issue as well when it passed the 1988 Act, since, as noted above, it subjected arbitrators to the stringent disqualification rules of 28 USC § 455.<sup>97</sup> The statute does not indicate, however, how the information relevant to disqualification will be collected or made available to the parties. In the case of federal judges, of course, extensive records must be filed on an annual basis disclosing financial and other interests.<sup>98</sup> To impose the identical requirement on every lawyer who might serve as an arbitrator in a court proceeding would be prohibitively expensive to administer and would undoubtedly deter many qualified individuals from participating in the program. On the other hand, to rely exclusively on the arbitrator's discretion and fortuitous public information for disqualifications does little to assure proper administration of Section 455's rules.

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<sup>94</sup> For this purpose, summary jury trials stand on a somewhat different footing. In courts that use them frequently, they have been described as a routine part of the pretrial process. See, for example, *Caldwell v Ohio Power Co.*, 710 F Supp 194, 202 (ND Ohio 1989). Several courts describe the summary jury trial as nothing more than a device to facilitate settlement. See *Cincinnati Gas & Electric v General Electric*, 854 F2d 900, 903 (6th Cir 1988); *Proimos*, 808 F2d at 1278; *Fraley v Lake Winnepesaukee*, 631 F Supp 160, 163 (ND Ga 1986).

<sup>95</sup> Indeed, it is relatively common to have the parties each appoint a partisan arbitrator, and then have the two partisans appoint a third arbitrator. Leeson & Johnston, *Ending It* at 51 (cited in note 11).

<sup>96</sup> 748 F2d 79, 84 n 4 (2d Cir 1984).

<sup>97</sup> See text accompanying notes 55-56; 28 USCA § 656(a)(2) (West 1968 & Supp 1990).

<sup>98</sup> See Ethics Reform Act of 1989, Pub Law No 101-194, Title II, § 202, codified at 5 USCA App I §§ 101(a), 101(f)(11), 102, 109(10) (West 1968 & Supp 1990), replacing 28 USC App I.

It may be possible to design some kind of manageable disclosure form for potential arbitrators that would address this problem. At this point, however, an appropriately strict statutory standard for impartiality and lack of bias appears difficult to enforce.

A second concern about arbitrators can be loosely termed quality control. Some existing programs require a certain number of years of practice—or other surrogates for competence—for panel chairs, but those standards are imprecise at best.<sup>99</sup> The pay for acting as an arbitrator is extremely low in existing programs; fees have ranged from nothing to \$200 per day or \$250 per case.<sup>100</sup> Whether this is good or bad for other reasons is debatable, but surely it indicates that the best lawyers will not devote large amounts of their time to serving as arbitrators. On the contrary, service as an arbitrator will compete with all other forms of *pro bono* activity that the individual might undertake.

Even though there are serious concerns about quality control, one might argue that these arbitrators are better than the alternatives: unsupervised settlement, trial to a state or federal judge or trial to a jury. In ordinary settlements, however, the parties are represented by the lawyers of their choice, who are at least as likely as volunteers to be qualified for court-annexed arbitration. Trial judges, whether federal or state, are people who have committed their careers (for the time being) to the process of judging, and hopefully are people who have had the opportunity to accumulate experience and expertise at that job.<sup>101</sup> Although arbitrators are not quite the random selection of citizens one finds on a civil

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<sup>99</sup> See, for example, NY Rules of Court § 28.4(a) and (b) (McKinney 1989) (requiring the Chief Administrator of the arbitral program to evaluate qualifications of arbitrators, and requiring the chair of a panel to be someone admitted to practice for at least five years); Pa RCP 1302(c) (George T. Bisel Co. 1988) (requiring chair of arbitral board to be admitted for at least three years); Ill Sup Ct Rule 87(b) (West 1989) (chair of panel must be member of bar who has engaged in trial practice for at least three years or be a retired judge). Panel members other than the chair in each of these states must be admitted to practice, but must meet no other specific statutory criteria.

<sup>100</sup> Ebener & Betancourt, *Court-Annexed Arbitration* at 9-10, Table 3 (cited in note 45).

<sup>101</sup> I am not necessarily arguing that the selection processes for either federal or state judges produce the most qualified people society has for those positions. In federal courts there has been serious concern in recent years that the pay levels for judges have become so low that the best lawyers are no longer willing to be considered. See, for example, *Justice for All* at 32 (cited in note 1); Richard Posner, *The Federal Courts: Crises and Reform* 32-40 (Harvard University Press, 1985). Secondly, the fact that judges are chosen and confirmed through a political process means that objective qualifications are not always foremost in the selector's mind. The problems with elected state judges may be even greater, but they go beyond the scope of this paper.

jury, the offsetting benefits of juries—in the form of the combined expertise of a group of six or twelve—are not present.

The way to address the quality control issue is far from clear. Several options are available: (1) “test” the volunteer arbitrators for competence, or require certain minimum qualifications for inclusion on an approved list; (2) create a permanent list from which arbitrators are drawn, and monitor performance over time, perhaps also increasing pay to attract better lawyers; or (3) professionalize the arbitrator corps, so that it looks much more like administrative law judges or magistrates. The minimal qualification option is the one now in use, and its problems lie in both the leniency of the objective standards and the imprecision of measures, such as admission to the bar or five years in practice. The second is a refinement of the first, but the addition of monitoring, long-term commitment to the system and increased pay make it significantly different. Note that these arbitrators may have a long-term commitment to the *system* without necessarily relying exclusively on their appointments as arbitrators for their income, as do some criminal defense lawyers. If certain repeat players were almost always the arbitrators, it would be best to move to the third option. Professionalizing the arbitrator group and formalizing their relationship to the courts would be a different way of ensuring a competent and objective decisionmaker for the litigants.

If, however, the third option were adopted, the civil courts would have created a “lower tier” for eligible cases. The model that comes closest to this today is that of the bankruptcy courts, although they are not limited to low amounts in controversy and “simple” cases. It is debatable whether such a lower tier of courts, lacking trial by jury and other formal procedures, from which one would have the right to trial *de novo* before the district court, is a good idea, or indeed is constitutional.<sup>102</sup> Furthermore, no one would argue that the existing court-annexed arbitration program fits this description. It seems that if court-annexed arbitration is to work the way its proponents contemplate, there is no alternative to accepting the risk of marginally qualified arbitrators.<sup>103</sup>

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<sup>102</sup> See, generally, *Northern Pipeline Construction Co. v Marathon Pipe Line Co.*, 458 US 50 (1982) (defining adjudication powers of non-Article III bankruptcy judges); *Granfinanciera, S.A. v Nordberg*, 109 S Ct 2782 (1989) (defining right to jury trial for fraudulent conveyance action in bankruptcy case).

<sup>103</sup> I would not argue that this has been the case so far. As long as court-annexed arbitration is seen as an experimental program, and it receives a great deal of publicity, I would expect relatively widespread interest from the bar, and a relatively large number of well-respected lawyers volunteering their time. Over the long run, however, when the novelty

Moving from arbitrator identity to the actual arbitral process, several important differences exist, which again are essential to maintain the advantages of court-annexed arbitration. Because of strict timetables, discovery is more limited. Rules of evidence at the hearing tend to be relaxed, and the amount of evidence introduced at the hearing is likely to be more restricted. All three of these differences help to make the arbitral process more efficient, and arguably more accessible, to the parties themselves. However, as noted before, there is a procedural price to pay for these benefits in the form of a greater risk of a decision being based on incomplete or unreliable evidence.

*Interaction between arbitral hearing and trial de novo.* Liti-gants pay a price for their right to a trial in an Article III court when they must decide whether to accept the arbitral award or to invoke that right. The arbitral process raises the cost of a trial de novo in two ways: first, the direct and indirect costs of the arbitration must be added to the rest of the litigant's pretrial expenditures; and second, the litigant who wants a trial de novo is subject to statutory penalties in the amount of the arbitrator's fee if the final result is not more favorable than the arbitration award, or if the court decides the demand for the trial de novo was not supported by good cause.<sup>104</sup>

It is easy to understand the initial impulse to place impediments in the way of the trial de novo. It would be foolish to structure court-annexed arbitration in such a way that it simply adds one more step to an already cumbersome system of civil procedure. On the other hand, to the extent that the system pushes litigants to accept the results of compulsory arbitration, the procedural short-cuts of arbitration become more troublesome. An award could, for example, be based on hearsay evidence that would not be admissible at the trial de novo. A jury might get a different feel for a case when all the witnesses are called, as compared with the arbitrator's impressions based on a smaller sample. If further dis-

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wears off, demands for more reliable assurances of quality control would become more urgent.

<sup>104</sup> 28 USCA § 655(d)(2) (West 1968 & Supp 1990). Interestingly, for arbitrations conducted because the parties requested them, that is, consensual arbitration, the penalties for demanding a trial de novo are stricter under the federal statute. Rather than simply the arbitrator's fee, the district court may assess costs pursuant to 28 USCA § 1920 (West 1968 & Supp 1990), and attorneys' fees against the party demanding the new trial, if that party fails to obtain a judgment *substantially more favorable* than the arbitration award, and the court decides that the demand for a new trial was in bad faith. 28 USCA § 655(e) (West 1968 & Supp 1990).

covery is possible after the arbitration, the factual background of the two proceedings would be inherently different.

These differences do not matter if the parties have freely chosen arbitration for the resolution of their dispute. They add up to second-class justice, however, in some subset of the cases that are submitted to compulsory arbitration—those whose results are affected by the truncated procedures. Since it is virtually impossible to identify those cases *ex ante* and to exempt them from arbitration, some other response is necessary. In the end, there may be no better alternative than the market: if the parties wish to demand a trial *de novo* after undergoing the time and expense of an arbitration, let them do so without any additional penalties. At any such trial, if the relevant law gives a right to costs and attorneys' fees to the winning party, the costs of the arbitration would be included. If it does not, however, then the arbitration should be treated exactly like any other part of the pretrial proceedings.

The arbitration hearing may affect the trial *de novo* in one final way that is troublesome from a different perspective. Because evidence is revealed for the arbitration, the hearing may affect post-arbitration settlement discussions or the trial *de novo*. In *Strandell*,<sup>105</sup> for example, the Seventh Circuit was concerned that information protected by the work-product privilege would be revealed at the arbitration hearing. Once out, of course, this evidence cannot be recalled, even if the rules formally state that evidence from the arbitration hearing is not admissible at the trial *de novo*.<sup>106</sup> Even assuming that access to the trial *de novo* is limited only by the parties' own calculations of how much to invest in the litigation, the key question is whether the court-annexed arbitration influences the trial before the Article III court in a manner that differs from conventional pretrial proceedings (such as discovery). Although any additional influence due to court-annexed arbitration appears to be minimal, this is an important effect to be studied.

*Systemic issues.* The systemic problems of court-annexed arbitration are different from those that affect the particular litigants. As noted above, the creation of this system may just be a somewhat clumsy way of establishing a lower tier of "sub-district"

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<sup>105</sup> 838 F2d 884 (7th Cir 1988).

<sup>106</sup> See 28 USC § 655(c) (West 1968 & Supp 1990). Note, however, that evidence that would otherwise be admissible under the Federal Rules of Evidence is not covered by that rule. Thus, statements by the parties at the arbitration hearing would presumably be admissible at the trial *de novo*. See FRE 801(d).

federal civil courts, for certain defined classes of cases. If that is what the public and Congress want, then it would be far better to establish openly such a lower tier. Access to the "sub-district" courts would be better, the obligations of the judges and their accountability to the public would be more clear, and proceedings and decisions would be public. The information generated by civil litigation would be available to those who need it, for example to those with similar small stakes civil suits. Lower tier courts might also seem attractive for other kinds of litigation, such as habeas corpus cases and social security disability cases.<sup>107</sup> In short, court-annexed arbitration from a public point of view may be the opening gambit in a much more profound reform of the federal courts.

Some of the differences between court-annexed arbitration and court proceedings are also problematic from the systemic standpoint. For example, arbitral proceedings are usually conducted behind closed doors, just like settlement. Even though judgment is entered on an award, the factual information and legal reasoning that led to that judgment are typically kept confidential. If court-annexed arbitration becomes the predominant method of resolving disputes that meet its eligibility criteria, public input and public judgment about the governing law will be severely compromised. As noted at the beginning of this article, if one takes the position that civil courts are outmoded anyway, this consequence is unimportant. That, however, is a proposition that I find exceedingly difficult to defend.

### III. IS COURT-ANNEXED ARBITRATION WORTH IT?

As the discussion thus far illustrates, court-annexed arbitration is an interesting and innovative procedure, but it is worth pausing in the rush to find solutions for crowded dockets to think about what kinds of legal trade-offs it entails. I realize that this call for caution may sound odd, or downright contrary, in the face of the careful studies conducted by organizations such as the RAND Institute for Civil Justice and the California courts<sup>108</sup>—all

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<sup>107</sup> The Federal Courts Study Committee proposes the creation of a new structure for adjudicating disability claims under the Social Security Act, which would use administrative law judges and an Article I Court of Disability Claims. *Federal Courts Study Committee Report* at 55 (cited in note 1). The Committee also recommends a stronger exhaustion requirement for state prisoner civil rights suits. *Id.* at 48. The *Federal Courts Study Committee Report* came to no conclusions about state habeas petitions, although it discusses this matter in more detail in part III. *Id.* at 51.

<sup>108</sup> Ebener & Betancourt, *Court-Annexed Arbitration* (cited in note 45); Simoni, Wise & Finigan, 28 Santa Clara L Rev at 577 (cited in note 73); *Report on Effectiveness of Judi-*



of which seem to show that participants in mandatory arbitration find it fair, open to their input and acceptably priced. Nonetheless, when one considers what problems court-annexed arbitration is supposedly addressing, it seems rather clear that, where it helps at all, it is at most a second-best solution for more pervasive ills in the system.

The list of the problems in the court system that court-annexed arbitration is designed to address is an impressive one. It includes:

- 1) Delays and docket congestion.<sup>109</sup>
- 2) Lengthy and formalistic proceedings.<sup>110</sup>
- 3) Procedural technicalities.<sup>111</sup>
- 4) Discovery abuse.<sup>112</sup>
- 5) Client alienation.<sup>113</sup>
- 6) Increasing judicial efficiency.<sup>114</sup>
- 7) Avoiding the (out-of-date) civil jury.<sup>115</sup>

None of these problems is unique to cases involving an amount in controversy of less than \$150,000, a contract or tort dispute, or a small stakes federal statutory (except constitutional or civil rights) claim. Unless one can show how devices such as court-annexed arbitration make a positive contribution to those issues that somehow benefits both the case sent to arbitration and the rest of the pending cases, it is hard to resist the conclusion that court-annexed arbitration is actually a distraction from the more fundamental reforms that the civil procedure system needs.

What, for example, does court-annexed arbitration do about the problem of delay and overcrowding of civil dockets? It appears, from studies that have been undertaken, that the vast majority of the cases sent to arbitration never reach the trial de novo stage,

*cial Arbitration*, in Judicial Council of California, 1984 *Annual Report* 6. See also Hensler, 1990 U Chi Legal F 399 (cited in note 11); Brazil, 1990 U Chi Legal F 303 (cited in note 11).

<sup>109</sup> See *Honeywell Protection Services v Tandem Telecommunications, Inc.*, 131 Misc 2d 814, 495 NYS2d 130 (1985).

<sup>110</sup> Steven Weller, John C. Ruhnka and John A. Martin, *Compulsory Civil Arbitration: The Rochester Answer to Court Backlogs*, 20 Judges' J 36, 36-37 (Summer 1981).

<sup>111</sup> *Id.*

<sup>112</sup> *Kimbrough*, 478 F Supp at 571.

<sup>113</sup> Weller, Ruhnka & Martin, 20 Judges' J at 41.

<sup>114</sup> Simoni, Wise & Finigan, 28 Santa Clara L Rev at 544 (cited in note 73). But see Hensler, 1990 U Chi Legal F at 410-13 (cited in note 11).

<sup>115</sup> See, for example, the concurring opinion of California Chief Justice Rose Bird in *Lyons v Wickhorst*, 42 Cal 3d 911, 727 P2d 1019, 321 Cal Rptr 738 (1986), in which the court seems concerned that court-annexed arbitration may be a means for the avoidance of civil jury trials.

and thus never call on the court's trial resources. It is also true, however, that most of these cases would have been settled anyway. Thus, looking strictly at delay, it is hard to detect any unique contribution on the part of court-annexed arbitration. Indeed, more cases may enter the system if litigants come to rely on arbitration, causing a slightly higher equilibrium ratio of cases to dispute resolution resources.<sup>116</sup>

The points about lengthy and formalistic proceedings and procedural technicalities are related. The forms of action may not be ruling us from their graves any more,<sup>117</sup> but fifty-two years of experience under the Federal Rules of Civil Procedure have given us our own version of unchecked procedural growth.<sup>118</sup> Trial practice by common consensus has three or four stages: pleadings, pretrial, trial and remedies. Though it is at its most formal during the trial phase, which still uses much of the ritual inherited from England, the other phases are influenced by the possibility of a trial. The rules of evidence contain at least as many procedural technicalities as the civil procedure rules, whether one refers to the latest version of the hearsay rule in the Federal Rules of Evidence or the federal common law or state law of privilege.

What is needed in this connection is not an evasion of formality and strict procedural and evidentiary rules for some cases that happen to fit the court-annexed arbitration criteria. Instead, there must be a careful study of how and when formality assists the civil dispute resolution process. It is possible that some cases benefit more from formality than others, and that rules of evidence justify their existence more in some circumstances than in others. Many people have noted that the days of a "one size fits all" system of civil procedure are over, assuming for the sake of discussion that they ever existed.<sup>119</sup> A case tracking approach, such as the one suggested by the Foundation for Change and Brookings Institution Task Force, whereby the district courts create separate tracks for simple cases, standard cases and complex cases, perhaps coupled with an option for voluntary court-annexed arbitration in any of

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<sup>116</sup> See, for example, Posner, *The Federal Courts* at 11 (cited in note 101), noting the "highway lane" effect whereby the increasing of capacity simply induces more demand for the service.

<sup>117</sup> See, generally, F.W. Maitland, *The Forms of Action at Common Law* (Cambridge University Press, 1909).

<sup>118</sup> For two symposia examining this phenomenon, see 137 U Pa L Rev 1873-2257 (1989); and 50 U Pitt L Rev 701-934 (1989).

<sup>119</sup> See *id* for representative articles on the current debate over trans-substantive procedure.

those tracks, would allow for the tailoring of procedural rules to meet the needs of the particular case.<sup>120</sup> Formality is not always bad, but the reaction of those who have enjoyed court-annexed arbitration indicates that there is often too much of it.

Discovery abuse, it should go without saying, is a problem that goes well beyond cases suitable for mandatory arbitration. Furthermore, it is wrong to think that the horror stories of discovery abuse come from the modest cases that are now eligible for court-annexed arbitration. To the contrary, it appears that discovery does not pose a substantial barrier to litigating these cases.<sup>121</sup> This, then, cannot help justify the present system of mandatory arbitration.

Client alienation is another problem that the bar should be addressing seriously. Perhaps the individual client with a small monetary claim feels more alienated from lawyers and courts than the general counsel of a large corporation. If, however, this point is just a variant of the complaint about stultifying procedures and too much formalism, then small and large litigants would probably have similar reactions. In addition, smaller clients may feel equally alienated if they discover that, for them, a trial in a courtroom before a jury is more costly than it would be for General Motors or Citicorp.

If court-annexed arbitration is actually improving the efficiency of the federal courts, then some of the other objections might be easier to dismiss. If efficiency means a reduction in the quantity of judicial resources (that is, time and money) needed to process each case, the evidence has not yet proven that proposition.<sup>122</sup> It is possible, of course, that arbitral hearings are improving the quality of dispositions, and that the fears of irrational juries, high-priced lawyers and crushing discovery are driving settlements rather than arbitral awards. This would be an efficiency gain of another sort—one that would predictably draw more cases into the civil pipeline, rather than result in any overall case reduction. If qualitative gains are the goal, which they surely should be, then the question is from where are those gains coming? The answer may be from the vastly expanded pool of "judges." If so, this result has consequences for the more general debate about

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<sup>120</sup> *Justice for All* at 14-17 (cited in note 1).

<sup>121</sup> One can infer that nothing, including discovery, is slowing down many types of cases in the federal courts by looking at the low median times for disposition of cases by nature of suit. See 1989 *Annual Report* at 216-17, Table C5A (cited in note 2).

<sup>122</sup> See Hensler, 1990 U Chi Legal F at 410-13 (cited in note 11).

the optimal size of the federal judiciary. The answer may be from the reduced time to hearing, or the reduced investment in discovery. Yet those gains may be possible for cases outside the arbitration track as well. As noted above, it is difficult to come to definitive conclusions about the efficiency point, since much remains to be studied. The answers, however, may suggest either that programs like court-annexed arbitration should become more firmly entrenched and institutionalized, or that they should be regarded merely as interim steps toward more comprehensive judicial reform.

Finally, it is possible that court-annexed arbitration has been embraced by those who believe that the Seventh Amendment has outlived its usefulness. If litigants are content with an arbitral hearing, then a great many civil jury cases have effectively been eliminated from the system. The problem with this result lies in its indirection. The Seventh Amendment, as part of the Bill of Rights, gives a particular right to those involved in civil trials in U.S. courts. There is nothing wrong with a national debate over the continued usefulness of the Seventh Amendment, but it is disingenuous to chip away at its protections for the smallest and least powerful litigants in the system. The jury right apparently still means a great deal to Americans, even those who are not affiliated with the trial lawyers. Granting, as I do, that the court-annexed arbitration programs authorized by Congress in the 1988 legislation do not actually violate the Seventh Amendment, it remains true that they substantially undercut the right to a jury trial by coercively channelling litigants into a different system. My objection here would be completely answered by making the arbitration system a voluntary one. Unfortunately, at its most basic level, mandatory arbitration seems too much like a back-door repeal of the Seventh Amendment for people with small claims.

#### CONCLUSION

The title of this Article announces that court-annexed arbitration is the wrong cure for whatever ails the federal courts. It is wrong both because the problems arbitration address go well beyond the small subset of cases that enter the arbitration program, and it is wrong because arbitration's own features need improvement. If court-annexed arbitration becomes, in effect, the lowest tier of federal civil court proceedings—the "sub districts" noted above—then it will need to conform much more closely to the judicial model. If, on the other hand, the values of informality and privacy take precedence, two choices are available. First, existing fed-

eral court-annexed arbitration programs could be revised so that the process becomes just another pretrial mechanism. As a pretrial mechanism, federal judges legitimately could compel participation, just as they presently compel compliance with discovery, Rule 16 and summary jury trials. In the alternative, court-annexed arbitration could follow the settlement model and become fully voluntary. The existing pilot programs, while they have undeniably offered useful insights into areas for judicial reform, do not offer a stable long-term solution for the federal courts.